

1 THE HONORABLE ROBERT S. LASNIK  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

9 TORREY GRAGG, on his own behalf and  
10 on behalf of other similarly situated persons,

11 Plaintiff,

12 v.

13 ORANGE CAB COMPANY, INC., a  
Washington corporation; and RIDECHARGE,  
14 INC., a Delaware Corporation, doing business  
as TAXI MAGIC,

15 Defendants.  
16

Case No. 2:12-cv-00576-RSL

PLAINTIFF'S MOTION FOR CLASS  
CERTIFICATION

NOTE ON MOTION CALENDAR:  
August 9, 2013

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1                   **I. INTRODUCTION**

2                   Defendants transmitted an advertisement to thousands of cellular telephones in  
 3 Washington State as part of a nationwide marketing campaign. To accomplish this mass  
 4 marketing, defendant RideCharge, Inc., engineered a proprietary computer system that sends  
 5 thousands of text messages automatically—every day—with human interference.  
 6 RideCharge purposely targeted consumers who were not using its products and had no prior  
 7 business relationship. RideCharge sent these consumers an advertisement for its services  
 8 without express consent.

9                   Plaintiff Torrey Gragg now moves the Court for class certification under Fed. R. Civ. P.  
 10                 23. The proposed class includes consumers who were sent text messages in violation of the  
 11 Telephone Consumer Protection Act (“TCPA”) and the Washington Commercial Electronic Mail  
 12 Act (“CEMA”). In Washington alone, as many as 100,000 consumers or more have been  
 13 affected by Defendants’ uniform, widespread, and illegal practice.

14                 Class actions under the TCPA and CEMA epitomize the policies of Rule 23 certification.  
 15 This is clear from the fact that courts in the Ninth Circuit have been near unanimous in  
 16 certification of TCPA cases. In this case and others like it, certification is vital to judicial  
 17 economy and indispensable to the enforcement of rights afforded by Congress and the  
 18 Washington Legislature in the TCPA and CEMA.

19                 Because this case arises out of a uniform illegal marketing campaign, common issues of  
 20 fact and law not only predominate but overwhelm any individual issues. In particular,  
 21 RideCharge contends that advanced consent, which is an affirmative defense under the TCPA,  
 22 can be implied when a consumer either provides their telephone number in ordering a cab, or  
 23 simply fails to block their number from being pulled from caller I.D.—as occurred with Mr.  
 24 Gragg. Whether this is express consent “clearly and unmistakably stated” under *Satterfield v.*  
*25 Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009) is a common issue of law.

26                 Other common issues include the following: When a Seattle, Washington consumer  
 27 orders a taxi by voice telephone call to Orange Cab, is this affirmative consent for a text message

1 from a completely separate company in Virginia, advertising that company's products? Are  
 2 Defendants' automated text messaging computers an "automatic telephone dialing system" under  
 3 the TCPA? Were Defendants' text messages "commercial text messages" under CEMA? Were  
 4 Defendants' text messages knowing or willful violations of the TCPA?

5 It is difficult to imagine a case better suited for certification because the common answers  
 6 to these issues will affect the entire class. Class certification is appropriate under Rule 23  
 7 considering the uniformity of claims, the uniformity of facts, and the multitudes harmed by  
 8 defendants' illegal text messaging scheme. The issues of law and fact are straightforward and  
 9 virtually identical. The claims asserted can be administered most efficiently using the class  
 10 vehicle, as the Western District of Washington has recognized in four previous class actions  
 11 under the TCPA and CEMA. A class action is superior to thousands of separate lawsuits, which  
 12 would prove unwieldy and inefficient, overburden the court system, and potentially lead to  
 13 inconsistent adjudications of the same issues of law and fact. Finally, as this Court has  
 14 recognized on multiple occasions, class certification under Rule 23 also ensures that the low  
 15 value of individual recovery under the TCPA and CEMA will not serve as a barrier to seeking  
 16 justice. Plaintiff respectfully requests that a class action be certified on behalf all consumers who  
 17 were sent illegal text messages by defendants.

## 18                   **II. RELIEF REQUESTED**

19 Pursuant to Fed. R. Civ. P. 23, Plaintiff respectfully requests that the Court certify the  
 20 following class:

21 All customers of Defendant Orange Cab who were sent at least one text message  
 22 to their cellular telephone number from Defendant Ride Charge without prior  
 express consent.

23 Plaintiff seeks certification pursuant to Fed. R. Civ. P. 23(b)(2) and/or (b)(3) in order for class  
 24 members to pursue their claims under the Telephone Consumer Protection Act and the  
 25 Washington Commercial Electronic Mail Act, RCW 19.190 *et seq.*

## 26                   **III. STATEMENT OF FACTS**

### 27                   **A. RideCharge Competes for Customers Who Use Smartphones**

RideCharge is a technology company headquartered in Virginia that owns "Taxi Magic,"

1 a smartphone application that can be used to order and pay for taxi services. *See Declaration of*  
 2 *Donald W. Heyrich ("Herich Decl."), Exhs. 3, 4.*<sup>1</sup> RideCharge was started by senior executives  
 3 from Concur Technologies, Inc. (NASDAQ: CNQR), which has a large ownership stake in  
 4 RideCharge and a seat on its Board of Directors. *Deposition of Thomas DePasquale* (Heyrich  
 5 Decl. Ex. A) 15:24-16:1, 16:20-24, *see also* Exh. 3 at 62. The entrepreneurs who grew Concur  
 6 into a \$4.5 billion company have positioned Taxi Magic to profit from smartphone growth. *E.g.,*  
 7 Exh. 3 at 66.

8 RideCharge generates revenue when consumers use its Taxi Magic app. RideCharge  
 9 collects a fee for these "rides," as well as for rides booked using RideCharge's SMS or Internet  
 10 booking. *DePasquale Dep.* 20:25-21:10. RideCharge does not make money when a consumer  
 11 calls directly to a cab company. *DePasquale Dep.* 34:12-35:4. Therefore, the explicit goal of  
 12 company marketing is to "increase electronically booked (online or mobile) methods provided by  
 13 RideCharge," by turning cab company "voice" customers into RideCharge customers.  
 14 *DePasquale Dep.* 76: 3-6; Exh. 38. In the words of RideCharge's president, the company goal is  
 15 to "move people up the chain to the smartphone." *Id.*, Exh. 37.

#### 16      **B. RideCharge Promotes Taxi Magic in Text Messages to Non-Users**

17      In 2010, RideCharge conceived of a high-impact promotional scheme that could be  
 18 targeted with precision. RideCharge invented something it calls a "Dispatch Notification." This  
 19 is a marketing scheme to send promotional text messages to non-users of RideCharge products.  
 20 *See DePasquale Dep.* 54:22-55:5.

21      A "Dispatch Notification" is a text message advertisement sent to a consumer who orders  
 22 a taxi without using RideCharge products. *See Exh.* 29 at 147 (graphic illustration); Exh. 20 at  
 23 361 (dispatch notifications "[i]nclude brief, high-impact marketing messages" that "rotate to  
 24 promote different products"). As senior RideCharge manager David Paul confirmed "a [dispatch  
 25 notification] to me has marketing, and we don't market to someone who's already booking

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26  
 27 <sup>1</sup> The depositions and exhibits cited herein are attached to the Declaration of Donald W. Heyrich in  
 Support of Plaintiff's Motion for Class Certification.

1       through one of our tools" Exh. 39 (emphasis added); *see also DePasquale Dep.* 67:13-24; 68:6-  
 2       8. The marketing messages encourage consumers to use RideCharge products instead of calling  
 3       the local taxi company, and many include an active link to download the Taxi Magic App.  
 4       *DePasquale Dep.* 76: 3-6. The marketing messages rotate "so that the customer receives  
 5       something different with each message and thus pays a little more attention." Exh. 42 at 1003.

6               To generate these messages, RideCharge engineered a computer system that extracts  
 7       data, remotely via the Internet, from independent taxi dispatch systems around the country,  
 8       specifically (1) telephone number, (2) time of taxi dispatch, and (3) cab number. The system is  
 9       programmed to automatically concatenate a text message using custom computer coding. The  
 10      data is automatically inserted into a message in a preprogrammed order and then a marketing  
 11      message is added. The marketing messages are inserted from a rotating list. Exh. 29 at 145.  
 12      RideCharge's own documents describe dispatch notifications as a "Marketing Response" in  
 13      which RideCharge sends a (1) "marketing message," (2) "automatically," (3) to the consumers'  
 14      telephone. Exh. 20 at 361, Exh. 29 at 147.

15               These text marketing messages achieve what RideCharge describes as a "high-impact"  
 16       promotion of Taxi Magic. Exh. 20 at 261. Quite literally, each message places advertising  
 17       directly into the hands of a consumer who orders taxis but is not using a RideCharge product,  
 18       and the active link allows installation of the Taxi Magic app with a couple of taps. This was not  
 19       only just a good marketing tool it was RideCharge's "*best* joint marketing tool." Exhs. 41, 42 at  
 20       1006-1007 (explaining that the text marketing was core to their business).

### 21       **C.      RideCharge Requires Taxi Companies to Allow Text Message Marketing**

22               RideCharge promoted "dispatch notifications" to taxi companies as a potential service for  
 23       their customers, but in truth they were just advertisements for RideCharge. *E.g.*, Ex. 43 ("we  
 24       shouldn't even bother" with dispatch notifications where "none of them promote anything");  
 25       Exh. 44 (describing the text messages as a "*gravy train*"). In the words of RideCharge's  
 26       president: "Let's turn off Dispatch Notifications if they aren't willing to market us. And in the  
 27       future we never want to start DN without our message being in there the first times a user gets

1 them it will have the biggest impact on their clicking on our message.” Exh. 45.

2       Taxi companies had no discretion to decide whether “Dispatch Notifications” would  
 3 benefit their customers. Text message marketing was explicitly *required* in order to do business  
 4 with RideCharge. Exh. 20 at 357. In addition, RideCharge told cab companies that dispatch  
 5 notifications would be free *only* if RideCharge could market its own products to the cab  
 6 company’s customers. *DePasquale Dep.* 101:24-102:3. Furthermore, any cab company that  
 7 hesitated to allow the marketing was threatened with higher prices for rides booked through  
 8 RideCharge products. *E.g.*, Exh.3 at 89 (prices reflect “co-marketing”); *DePasquale Dep.*  
 9 100:20-101:5. (“you pay a little bit more” if you say no to marketing RideCharge’s services). As  
 10 RideCharge explained to a Texas cab company:

11 requirement for...co-marketing activity of including a link in the Dispatch Notifications  
 12 [text messages] that promoted downloading the smart phone app or booking with  
 13 SMS...any pricing this low for Taxi Magic requires the fleets to do the co-marketing  
 message above, and in return, we establish your fleet as the “default provider” for that  
 user and bypass the directory screen at the opening of the app.

14 *Id.* Exh 46. (threatening to increase price by over 75% if the cab company did not allow  
 15 RideCharge advertising to its customers). The entire campaign was propelled by significant  
 16 internal pressure that was placed on RideCharge’s sales team. As one senior official commented,  
 17 “I told her [a customer] very clearly that I would be in “hot water” with my “boss” for turning  
 18 off marketing.” *Id.* Exh 47.

19       By September 2010, RideCharge was sending marketing text messages to the customers  
 20 of cab companies across the United States. Exh. 48 (listing companies and the marketing text).  
 21 There was not a single one of these messages that did not include marketing. “I ran a list of the  
 22 messages currently in the system. At this time, no one is running a message that does not include  
 23 some type of marketing.” Exh. 50; *DePasquale Dep.* 92:3-9, 94:1-7. Each marketing message  
 24 was one of nine identical messages. Exh. 49; *see also DePasquale Dep.* 91:12-15.

25 **D. RideCharge Sent Promotional Text Messages To Over 100,000 Orange Cab  
 Customers**

26 Beginning on July 30, 2010, RideCharge began sending “dispatch notifications” to  
 27 Orange Cab customers. *Deposition of Tadesse Woldearegaye* (Heyrich Decl. Exh. B) 39-40, 96.

1 Defendants have refused to provide any class lists in discovery. However, RideCharge's internal  
 2 reports indicate that as many as 100,000 or more consumers received a marketing text message  
 3 from RideCharge because they called Orange Cab for a taxi. *DePasquale Dep.* 76: 3-6; 221:9-11  
 4 (1,000 marketing messages a day); Dkt. No. 14 ¶ 7 ("more than 10,000 text messages to more  
 5 than 100 of Orange Cab's customers in Washington that were the same or similar to" plaintiff's).  
 6 It is highly likely that the number of illegal text messages is significantly higher because Orange  
 7 Cab provides approximately 8,000 rides every week, and most of those are customers who call  
 8 Orange Cab. *Woldearegaye Dep.* at 17; 146-48.

9 Mr. Gragg, received one of these marketing text messages. On Saturday, February 25,  
 10 2012, Mr. Gragg and several of his friends needed transportation. *Declaration of Torrey Gragg*  
 11 ("Gragg Decl.") ¶2. At approximately 5:17 p.m., Mr. Gragg called Orange Cab for the nearest  
 12 available taxi cab. *Id.* ¶ 3. At no time during this process—or at any time—did Mr. Gragg give  
 13 any of the Defendants permission to send him a text message. *Id.* ¶ 4. In fact, Mr. Gragg did not  
 14 even provide his telephone number to Orange Cab when he called. *Woldearegaye Dep.* 134:10-  
 15 13, 136:4-9. His number was captured using electronic caller identification technology and  
 16 stored in OrangeCab's dispatch computers. RideCharge then extracted his information from  
 17 Orange Cab's system, concatenated a marketing text message, and transmitted it to his telephone.  
 18 *Id; se, also* Ex. 29 at 147. At 9:04 pm the next evening, RideCharge sent Gragg an unsolicited  
 19 text message advertisement *Id.* ¶ 5. RideCharge cannot or will not explain why Mr. Gragg's  
 20 message was transmitted the next day. One hundred others also complained that same day of  
 21 receiving a text message when they had not ordered a taxi. *See* Exh. 36.

#### 22 E. RideCharge Failed To Obtain Express Consent For Its Marketing Messages

23 Instead of obtaining advanced consent, RideCharge's advertising campaign relied on  
 24 sending messages to every call received, and allowing a consumer to opt-out later. *DePasquale*  
 25 *Dep.* 131:11-20. The marketing vice president who invented "dispatch notifications" had  
 26 reservations about this, stating:

27 I think the one thing we have to keep in mind is that we send the initial DN [marketing  
 message] without a user request, and then we give them the option to out. Not quite in

line with MMA [mobile marketing associate] guidelines.

Exh. 40 (Jay McClary, Vice President of Marketing). Thus, it is undisputed that neither Orange Cab nor RideCharge asked for express consent. *Id.* at 118: 1-3. (“we did not ask that question. We waited for you to say no”). *Woldearegaye Dep.* 99:24-100:2; 128:23-129:1. The lack of consent was conceded by CEO *DePasquale*.

Q. So it is fair to say that it was understood at the highest levels of the company that consumers were getting these messages without first expressly opting in?

A. Yes

*DePasquale Dep.* 118: 1-3. RideCharge anticipated that some consumers would complain precisely *because* express consent was never part of the plan. *E.g., DePasquale Dep.* 96:5-8; Exhs. 42 at 1006-1007, 51 (“I sent a flyer yesterday that should be posted around the call center to let call takes know how to address concerns from customers who prefer to not receive text messages”). In one example, RideCharge sent its advertising to a group of low income individuals who were charged for the text messages. *Woldearegaye Dep.* 107:4-11; Exh. 33. RideCharge was requested to immediately stop spamming these individuals, precisely because, they never received permission in the first place. *Id.* Express consent was not part of the plan.

#### **IV. STATEMENT OF ISSUES**

Whether this action should be certified as a class action under Fed. R. Civ. P. 23(b)(3) or 23(b)(2).

#### **V. ARGUMENT**

##### **A. The Policies Behind Rule 23 Require Certification to Protect the Interests of Justice and the Rights of the Class**

Over thirty years ago, the United States Supreme Court confirmed that “[c]lass actions serve an important function in our system of civil justice.” *Gulf Oil Co. v. Barnard*, 452 U.S. 89, 99 (1981). This is particularly true in consumer protection claims where a Defendant may have committed a multitude of small violations across a large group of consumers. As the entire panel of the Washington State Supreme Court recently stated, “the interests of justice require that in a doubtful case ... any error, if there is to be one, should be committed in favor of allowing the class action.” *Scott v. Cingular*

1      *Wireless*, 160 Wn.2d 843, 857, 161 P.3d 1000, 1007 (2007) (emphasis added). This  
 2      Court affirmed the same principle in *Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642  
 3      (W.D. Wash. 2007), when it held that, under the TCPA, the lack of shifting attorney  
 4      fees and the small amount in controversy would often create a bar from Plaintiffs  
 5      seeking relief, undercutting a core purpose of Rule 23:

6      If the claims were adjudicated individually, defendant would owe the same  
 7      amount of damages. Rather, it is hoping that if no class is certified, it will  
 8      avoid damages for the vast majority of its violations. The Court will not  
 9      decline to certify a class on that basis. Furthermore, the class size is a direct  
 10     result of defendant's large number of violations, for which it should not be  
 11     rewarded.

12     *Id.* at 650. Washington is not alone in upholding these core policy considerations  
 13     in the context of TCPA litigation. The Kansas Supreme Court looking at the  
 14     policy behind Rule 23 reached the identical conclusion:

15     We do not agree with the defendant's contention that over 100,000 individual small  
 16     claims actions would be superior to a single class action. While the defendant in such an  
 17     action might benefit if only a small number of plaintiffs found it worth their while to  
 18     bring suit or were aware of their rights under the TCPA, this small turnout would serve  
 19     only to frustrate the intent of the TCPA and to protect junk fax advertisers from liability.  
It would, accordingly, not provide a "superior" method for individual plaintiffs.

20     *Critchfield Physical Therapy v. Taranto Group, Inc.*, 263 P.3d 767, 780 (Kan. 2011) (certifying a  
 21     TCPA illegal marketing class Kansas's equivalent of Rule 23(b)(3)). Thus, although the trial  
 22     court is afforded great discretion under Rule 23, even close cases (which this is not)  
 23     should be decided in favor of certification, "for it is always subject to modification  
 24     should later developments during the course of trial so require." *Esplin v. Hirschi*,  
 25     402 F.2d 94, 99 (10th Cir. 1968); *see also Moeller v. Farmers Ins. Co. of Washington*, 173  
 26     Wn. 2d 264, 278, 267 P.3d 998, 1004 (2011) (holding that Rule 23 "is to be liberally interpreted  
 27     because the rule avoids multiplicity of litigation...[and] is always subject to later modification or  
 28     decertification by the trial court, and hence the trial court should err in favor of certifying the  
 29     class"); *see also Sax v. World Wide Press, Inc.*, 809 F.2d 610, 615 (9th Cir. 1987)  
 30     (noting the strong public policy in pursuing claims collectively versus the judicial  
 31     burden created by an overwhelming sea of individual claims). It is in this context that

1 the Court should start with the fundamental “policy of class litigation, which favors  
 2 filing a single lawsuit rather than many.” *Catholic Soc. Services, Inc. v. I.N.S.*, 232  
 3 F.3d 1139, 1153 (9th Cir. 2000).

4 **B. Rule 23 Certification is Based on the Facts and Legal Theory as Pled**

5 Although the merits of this case are compelling, the Court need not consider them while  
 6 deciding this motion for class certification. “[O]n a motion for class certification, a court may  
 7 not decide the merits of the case, but must accept the substantive allegations contained in the  
 8 complaint as true.” 5 Moore’s Federal Practice & Procedure § 23.46[4] (3d ed.); *see also*  
 9 *Freedman v. Louisiana Pacific Corp.*, 922 F. Supp. 377, 398 (D. Or. 1996) (in ruling on motion  
 10 to certify the court does not consider the merits). Thus, a district court in considering a motion  
 11 for certification is “bound to take the substantive allegations of the complaint as true.” *Blackie*  
 12 *v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976). The  
 13 factual allegations and legal theories are presumed to be true.

14 The Ninth Circuit’s *United Steel* decision is highly instructive on the proper analysis under  
 15 Rule 23. *See United Steel v. ConocoPhillips Co.*, 593 F.3d 802, 809 (9th Cir. 2010). In *United*  
 16 *Steel*, although the district court found that all four provisions of Rule 23(a) had been met, it  
 17 denied plaintiff’s certification motion under Rule 23(b)(3)’s “so-called predominance requirement  
 18 [because] if Plaintiffs’ [liability theory] is rejected...The Court will be faced with a  
 19 case...requiring individualized trials on each class member’s meal period claims...and a class  
 20 would not be superior method of resolving this suit.” *Id.* at 805. In other words, the district court  
 21 based its decision to deny certification on defendant’s argument that, *if* plaintiff was incorrect  
 22 about its overarching legal theory, *then* liability could only be established by applying an  
 23 unmanageable individualized inquiry. *Id.* The Ninth Circuit reversed the decision finding the  
 24 district court improperly applied the standard for review of a certification motion and in doing so  
 25 abused its discretion. The Ninth Circuit held that

26 a court can never be *assured* that a plaintiff will prevail on a given legal theory prior to a  
 27 dispositive ruling on the merits, and a full inquiry into the merits of a putative class’s  
 legal claims is precisely what both the Supreme Court and we have cautioned is not  
 appropriate for a Rule 23 certification inquiry. *See Eisen*, 417 U.S. at 177–78, 94 S.Ct.

1           2140; *Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir.2003) (noting that “this circuit  
 2           does not favor denial of class certification on the basis of speculative conflicts”); *Staton*,  
 3           327 F.3d at 954; *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9th Cir.1983)  
 4           (holding that “it is improper to advance a decision on the merits to the class certification  
 5           stage”).

6           Id. at 809. Therefore, when determining whether a case should be certified, the court must accept  
 7           as true not only the factual allegations as pled in the complaint, but review the requirements of  
 8           Rule 23 based on “plaintiffs’ *actual* legal theory.” *Id.* at 808. (emphasis in original); *See also S.*  
 9           *Ferry LP No. 2 v. Killinger*, 271 F.R.D. 653, 657 (W.D. Wash. 2011) (confirming that a district  
 10          court must not decide the merits of a factual or legal dispute before it grants class certification).

11          To be sure, some consideration of the factual predicates of Rule 23 itself is necessary but  
 12          for the policy reasons stated above, “[p]ursuant to Fed.R.Civ.Proc., Rule 23, plaintiff’s burden of  
 13          establishing a factual basis for class certification is not a heavy one.” *Irwin v. Mascott*, 96 F.  
 14          Supp. 2d 968, 971-72 (N.D. Cal. 1999). Moreover, “it is generally accepted that Rule 23 should  
 15          be liberally construed.” *Newberg & Conte, Newberg on Class Action* § 7.20 (4th ed. 2002).  
 16          Thus, even though the Court must carefully consider each prong of Rule 23, plaintiffs are  
 17          entitled to the benefit of common sense assumptions regarding these facts. *Id.* at § 7.19-20.

18          These standards and policy considerations are heightened when the case involves small  
 19          amounts of individualized damages in a consumer protection action. Thus, “except where  
 20          underlying class facts and circumstances are sheer speculation, the initial burden on the party  
 21          invoking the class action to show class facts is light. A well-pleaded complaint usually  
 22          constitutes a *prima facie* showing of these facts sufficient to shift immediately the burden of  
 23          disproving them to the party opposing the class.” *Id.*

### 24          C.      The Class Meets Each of Four Requirements of Rule 23(a)

25          To be certified as a class, the proposed class must meet all four elements of Fed. R. Civ.  
 26          P. 23(a), i.e, numerosity, commonality, typicality, and adequacy of representation. The class  
 27          must also meet the requirements of any one of the subdivisions of Rule 23(b). Plaintiffs meet the  
 28          four requirements of Rule 23(a). Plaintiffs also have sufficiently met the criteria of Rule  
 29          23(b)(3), and alternatively (b)(2) fully discussed *infra*.

1       1.     Defendants' widespread illegal marketing campaign satisfies numerosity.

2              Fed. R. Civ. P. 23 (a)(1) requires a proposed class to be so numerous that joinder of all  
 3 class members in the action is impracticable. While there is no magic number under federal law  
 4 which automatically renders joinder impracticable, impracticability of joinder is self-evident in  
 5 this case. The proposed class consists of many thousands of customers of Orange Cab and thus  
 6 clearly meets the numerosity requirement. *See Slaven v. BP America, Inc.*, 190 F.R.D. 649  
 7 (C.D. Ca. 2000) (analyzing Ninth Circuit and treatise authority to conclude that the numerosity  
 8 requirement is met when the class exceeds 40 members) ; *see also Z.D. ex rel. J.D. v. Grp.*  
 9 *Health Co-op., C11-1119RSL*, 2012 WL 5033422 (W.D. Wash. Oct. 17, 2012) (affirming that  
 10 when a class exceeds 40 numerosity has been established); *see also Newberg* § 3:05 at 3-25 (“In  
 11 light of prevailing precedent, the difficulty inherent in joining as few as [forty] class members  
 12 should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large  
 13 or larger should meet the test of Rule 23(a)(1) on that fact alone.”); see also *Jordan v. County of*  
 14 *Los Angeles*, 669 F.2d 1311, 1320 (9th Cir. 1982) (provided an extensive survey of class  
 15 certification across the Circuits regarding numerosity—citing cases where the class was  
 16 composed of as little as seven members).

17              Defendants have already conceded that they sent at least 10,000 messages to over 100  
 18 Washington consumers. Dkt. No. 14 ¶ 7. Numerosity is easily met.

19       2.     Common questions of fact and law dominate Plaintiff's class claims due to  
Defendants uniform illegal marketing campaign.

20              The second requirement under Fed. R. Civ. P. 23(a) is that there are questions of law or  
 21 fact common to the class. The Ninth Circuit has instructed that *either* a common issue of law or a  
 22 common issue of fact is sufficient to meet the requirement.

23              All questions of fact and law need not be common to satisfy the rule. The existence of  
 24 shared legal issues with divergent factual predicates is sufficient, as is a common core of  
 salient facts coupled with disparate legal remedies within the class.

25              *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019-20 (9th Cir. 1998). The requirement is met by a  
 26 “minimal” showing and is “not high.” *Id.* As long as “the class members have suffered the same  
 27 injury” commonality will be established. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551,

180 L. Ed. 2d 374 (2011). “An alleged common course of conduct is sufficient to satisfy the common question requirement of Fed.R.Civ.P. 23(a)(2).” *Scott v. Aetna Servs.*, 210 F.R.D. 261, 267 (D. Conn. 2002). *Z.D. ex rel. J.D. v. Grp. Health Co-op.*, C11-1119RSL, 2012 WL 5033422 (W.D. Wash. Oct. 17, 2012) (holding that “nothing more is required” than a single question of either law or fact).

In examining certification under the TCPA for unsolicited text messages, the Southern District of California, on December 15, 2011, found that in such a text messaging marketing case, *both* common issues of facts as well as common issues of law exist under Rule 23(a)(2).

Here, the members of the proposed class allegedly each received two text messages: one initial text message that advertised Defendant’s products or services, and a second confirmatory text message following the class member’s opt-out text message. Thus, in addition to sharing “a common core of salient facts,” the class members share one common legal issue: whether the confirmatory text messages sent by Defendant to the class members violated the TCPA. Rule 23(a)(2) is therefore satisfied.

*Lo v. Oxnard European Motors, LLC*, No. 11CV1009 JLS MDD, 2011 WL 6300050, at \*2 (S.D. Cal. Dec. 15, 2011). On similar grounds, this Court certified a junk fax case finding commonality where plaintiff sufficiently pled that defendants sent unsolicited facsimiles to a class of over 3,000 persons.

The TCPA will apply to all class members, and Washington law will apply to all members of the Washington subclass. Furthermore, it is undisputed that [defendants] engaged in a common course of conduct by obtaining the facsimile numbers in the same way and sending the same broadcast facsimile<sup>4</sup> to all recipients within a short period of time as part of the same effort to generate new business....accordingly, the commonality requirement is met.

*Kavu*, 246 F.R.D. at 647. Moreover, in this last year, the Western District on three occasions found commonality under nearly identical TCPA claims where plaintiffs alleged that defendants had autodialed consumers’ cellular telephones without their express consent. *See Agne v. Papa John’s Int’l*, 286 F.R.D. 559, 567-68 (W.D.Wash. 2012) (building upon this Court’s decision in *Kavu* ruling and finding commonality where plaintiff had pled “class members were sent substantially similar unsolicited text messages by the same defendants, using the same automatic dialing technology, commonality is satisfied.”); *Arthur v. Sallie Mae, Inc.*, No. C10-0198JLR, 2012 WL 90101, at \*6-7 (W.D. Wash. Jan. 10, 2012) (holding that “because commonality

1 requires only a single common question" Rule 23(a)(2) has been established); *McClintic v. Lithia*  
 2 *Motors, Inc.*, No. C11-859RAJ, 2012 WL 112211, at \*\*3-4 (W.D. Wash. Jan. 12, 2012) (finding  
 3 certification appropriate under Rule 23(a) and Rule 23(b)(3) when defendants spammed over  
 4 58,000 consumers with text messages to solicit their product.<sup>2</sup> The court held in such TCPA and  
 5 CEMA illegal text message marketing cases that "common questions arising from [defendant's]  
 6 marketing campaign predominate," and therefore, certification is appropriate on those grounds.).

7 Here, the facts are nearly identical to those certified by the Western District of  
 8 Washington last year in *Agne, Arthur*, and, *McClintic*. Defendants used functionally an identical  
 9 ATDS to send over 10,000 marketing messages to consumers in Washington. This uniform  
 10 marketing scheme caused identical statutory violations and give rise to identical  
 11 statutory damage claims by all of the class members. From this marketing campaign,  
 12 common facts predominate such as (1) dispatch notices were sent to every consumer with a cell  
 13 phone who order a taxi from Orange Cab, (2) each message sent to an Orange Cab customer was  
 14 done by RideCharge, (3) each dispatch notice contained one of 9 identical marketing messages;  
 15 (4) Defendants based their consent to send these marketing messages by the mere fact that  
 16 someone called for a taxi; and (5) the marketing was done with an automated "TaxiMagic"  
 17 computer system, which used an identical process each transmission.

18 Moreover, all liability issues are common to the class. Common issues of liability are  
 19 predominant because the conduct itself—and therefore any legal defenses to it—apply with equal  
 20 force to Mr. Gragg as they would to any other putative class member. *See Durrett v. John Deere*  
 21 Co., 150 F.R.D. 555, 558 (N.D. Tex. 1993) ("Because this action arises out of a single type of  
 22 contract that is virtually, if not completely, identical in each transaction with [the company],  
 23 common questions of law and fact abound"). Common questions of law in the instant case

24  
 25 <sup>2</sup>It should be noted in *Arthur*, because the court was considering certification in the context of a settlement, the  
 26 court found the standard was heightened from a contested matter; "[t]he court must pay undiluted, even heightened,  
 27 attention to class certification requirements' because, unlike in a fully litigated class action suit, the court will not  
 have future opportunities 'to adjust the class, informed by the proceedings as they unfold.' *Arthur*, 2012 WL 90101,  
 at \*6 (emphasis added).

1 include but are not limited to (1) whether Defendants' contention that providing your phone  
 2 number in connection with taxi services is sufficient to establish a business relationship; (2)  
 3 whether an established business relationship is a defense to sending text messages to a cellular  
 4 phone without express consent under the TCPA and/or CEMA; (3) whether a text message is a  
 5 phone call within the meaning of the TCPA; (4) whether the system used by RideCharge  
 6 qualifies as an "auto-dialer" under the TCPA; (5) whether the text message is considered a  
 7 "commercial electronic text message" under RCW 19.190.060; and (6) whether the violation of  
 8 the TCPA was "knowing" or "willful." Each of these overarching legal issues is raised by the  
 9 common pleading in Plaintiffs' complaint. *See Agne*, 286 F.R.D. at 567-568 (finding the  
 10 identical common issues under both the TCPA and Washington law in certifying a text blasting  
 11 case under Federal Rule 23). Consequently, the presence of these common issues of both fact  
 12 and law each separately satisfy the minimal pleading prerequisite of commonality. Finally,  
 13 because these questions are common to the entire class and predominate all individual issues,  
 14 certification of the class will provide the superior method for ensuring fair and efficient  
 15 adjudication, meeting the necessary 23(b) findings as well. *See infra.*

16       3.     Mr. Gragg's claims are typical of the class and no conflict exists.

17       The third prerequisite for a class certification under Fed. R. Civ. P. 23(a)(3) is that the  
 18 claims or defenses of the class representatives be typical of those of the class members. "When  
 19 it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff  
 20 and the class sought to be represented the typicality requirement is usually satisfied, irrespective  
 21 of varying fact patterns which underlie individual claims." *Kavu*, 246 F.R.D. at 648 (finding  
 22 typicality under the TCPA where plaintiff alleged it received the same improper facsimile from  
 23 the named defendant); *see also Lo*, 2011 WL 6300050, at \*3 (holding that because "plaintiff and  
 24 the class members assert the same violation of the TCPA arising from the confirmatory text  
 25 messages sent by Defendant, Plaintiff's claims are typical of the claims of the class members");  
 26 *Agne*, 286 F.R.D. at 569 (holding plaintiff's "claims, like all class members' claims, arise from  
 27 text marketing campaigns commissioned by Papa John's franchisees and executed by the same

1 marketing vendor" and therefore typicality exists).

2       Typicality exists if the claims of the class representative and the members of the class  
 3 "stem from a single event or are based on the same legal or remedial theory." 7A Wright &  
 4 Miller, Federal Practice and Procedure § 1764. The Ninth Circuit has held that, where the  
 5 challenged conduct is out of a common practice imposed against all class members,

6       the typicality inquiry involves comparing the injury asserted in the claims raised  
 7 by the named plaintiffs with those of the rest of the class. We do not insist that the  
 8 named plaintiffs' injuries be identical with those of the other class members, only  
 9 that the unnamed class members have injuries similar to those of the named  
 10 plaintiffs and that the injuries result from the same, injurious course of conduct.

11       *Armstrong v. Davis*, 275 F.3d 849, 868-69 (9th Cir. 2001). Here, Mr. Gragg was subjected to the  
 12 same illegal marketing campaign, by the same marketing vendor, soliciting him to respond to the  
 13 DN-Marketing text and to download services from RideCharge. His claim is not only typical but it  
 14 is identical to the common claims of the class, *i.e.* a violation of the TCPA and WCPA based on this  
 15 specific marketing campaign.

16       4.       The class is adequately represented by both Mr. Gragg and class counsel.

17       The fourth prerequisite, adequate representation, is meant to ensure that the absent class  
 18 members are properly represented by both the named class representatives and their attorneys.  
 19 "Rule 23(a)(4) permits the certification of a class action only if the representative parties will fairly  
 20 and adequately protect the interests of the class." *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir.  
 21 2003). In *Staton*, the Ninth Circuit established the test for adequacy as follows: "To determine  
 22 whether the representation meets this standard, we ask two questions: (1) Do the representative  
 23 plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the  
 24 representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?"

25       Mr. Gragg is capable of "fairly and adequately protect[ing] the interests of the class." Fed.  
 26 R. Civ. P. 23 (a)(4); *Gregg Decl.* ¶¶ 7-8. His common interests with the class are addressed above.  
 27 There are no conflicts of interest between Mr. Gragg and the class members. The class and Ms.  
 28 Gragg were subjected to the same illegal marketing practices of Defendants. Mr. Gragg takes his  
 29 role as class representative seriously and is committed to and protecting the interests of the class. *Id.*

Finally, counsel for the class has extensive experience in class action lawsuits, and are adequate counsel for the class. The class would be represented by class counsel Donald W. Heyrich, founding partner of Heyrich Kalish McGuigan PLLC and Albert H. Kirby of the Kirby Law Group. *Heyrich Decl.* ¶¶ 2-9. Counsel's experience is further outlined in Mr. Heyrich's declaration. *Id.* Combined, plaintiff's have substantial experience in class, collective and representative actions and are amply qualified to handle the claims in this lawsuit. *Id.* Counsel takes their responsibility seriously and is committed to the resources and advocacy necessary to see this case brought to resolution. *Id.*

**D. A Class Action is Maintainable Under Both Rule 23(b)(3) and, Alternatively, Under Rule 23(b)(2)**

A plaintiff meeting the requirements of Rule 23(a) must also demonstrate that the case is maintainable as a class action under Rule 23(b). The test asks whether, taking the facts and legal theory as pled by the Plaintiff—as well as a common sense review of the evidence developed thus far, the case presents a manageable class action. *See United Steel*, 593 F.3d at 809; *see also Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 582 (9th Cir. 2010), *rev'd on other grounds*, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). Again, “[t]he benefit of any doubts as to manageability should be resolved in upholding the class, subject to later possible reconsideration.” *Newberg* § 7:26. Here, Plaintiffs seek certification per Rule 23(b)(3) and alternatively under Rule 23(b)(2). Each test is considered below.

1. Class certification is maintainable under Rule 23(b)(3) because common questions predominate over individual inquiries and the class mechanism is superior to thousands of individual cases.

As a consequence of Defendants' broad and uniform illegal marketing practice, the class is maintainable under Rule 23(b)(3). Plaintiff easily vaults the various Rule 23(a) criteria, and this is perhaps the best indicator that Rule 23(b) (3) is satisfied. *See Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986) (satisfaction of Rule 23(a) “goes a long way toward satisfying the Rule 23(b) (3) requirement of commonality”). When seeking “opt-out” class certification, the plaintiff must fulfill the additional requirements set forth in Rule 23(b)(3): (1) common questions must predominate over any questions affecting only individual members; and (2) class resolution must

1 be superior to other available methods for the fair and efficient adjudication of the controversy.  
 2 Fed.R.Civ.P. 23(b) (3); *see, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

3       **Predominance.** This Court has long recognized “that the predominance of common  
 4 issues requirement under Rule 23(b)(3) is a test readily met in certain cases alleging consumer ...  
 5 fraud.” *Mortimore v. F.D.I.C.*, 197 F.R.D. 432, 438 (W.D. Wash. 2000), *citing Amchem Prods.,*  
 6 *Inc. v. Windsor*, 521 U.S. 591 (1997). The reason is simple: when a defendant takes a common  
 7 action (here, text marketing) and applies it to a mass group of consumers, the defenses and  
 8 necessary proof overwhelmingly applies to the class as opposed to any individual. *See generally,*  
 9 *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1174 (9th Cir. 2010) (reversing the  
 10 district court’s denial of certification and holding that in a consumer protection class action  
 11 common issues predominate in spite of defendants individualized causation theories); *see also*  
 12 *Kelley v. Microsoft Corp.*, 395 F. App’x 431, 432 (9th Cir. 2010) (reversing the district court’s  
 13 denial of certification in an alleged illegal marketing practice to consumers by Microsoft holding  
 14 that the Court improperly failed to balance the common issues of law and fact established in its  
 15 commonality findings under Rule 23(a)(3), as well as the inherent commonality in a CPA claim).  
 16 Moreover, as this Court held even “A single common issue may be the overriding one in the  
 17 litigation, despite the fact that the suit also entails numerous remaining individual questions.”  
 18 *Olson v. Tesoro Ref. & Mktg. Co.*, C06-1311RSL, 2007 WL 2703053 (W.D. Wash. Sept. 12,  
 19 2007)

20       Here, it is evident that Defendants’ illegal marketing campaign and the common and  
 21 uniform transmission of over 100,000 text messages is the predominant and overarching issue  
 22 being litigated before this Court. If the Court finds later on summary adjudication that giving  
 23 your phone number when inquiring about taxi services is sufficient basis for consent under the  
 24 TCPA and CEMA, such a decision shall apply to every class member. If the Court determines  
 25 that the computer system used is an auto-dialer under the TCPA, then that determination will  
 26 apply to every class member. If Defendants argue that because they dialed from a known list of  
 27 identified numbers there is no violation of the TCPA or CEMA, this contention applies equally to

1       every transmission. If under Washington law there is a *per se* violation of CEMA, then the *per*  
 2       *se* statutory \$500 recovery applies with equal force to every member of the class.

3       Therefore, this case will not simply be determined predominately by class-wide issues of  
 4       law and fact, but those issues overwhelm all others. Again the Western District's rulings are  
 5       directly on point. In *Agne*, a third party marketing company send text advertisement to Papa  
 6       John's customers. *Agne*, 286 F.R.D. at 561-63. There, Judge Coughenour found that the common  
 7       process, vendor, and similar text messages used in the illegal marketing campaign created  
 8       common legal issues and answers which will one way or another "resolve an issue that is central  
 9       to the validity of each of the claims in one stroke." *Id.* at 567.

10      Judge Coughenour's decision in *Agne* simply built upon this Court's 2007 decision in  
 11     *Kavu* regarding an similarly pleaded claim for violations of the TCPA and WCPA due to the  
 12     transmission of unsolicited facsimiles. There, the Court found that the case should be certified  
 13     under Rule 23(b)(3) because both predominance and superiority had been established. *Kavu*, 246  
 14     F.R.D. at 650 (holding that violations of the TCPA and WCPA predominate any individualized  
 15     inquires regarding an illegal fax marketing campaign). Moreover, the Court again in 2012 found  
 16     predominance in a TCPA certification case accepting plaintiff's contention that "common  
 17     questions present a significant aspect of the case" where defendants had engaged in automatic  
 18     telephone calls to plaintiffs cellular phones in violation of the act. *Arthur*, 2012 WL 90101, at  
 19     \*8-9. Moreover, two days later the Western District reaffirmed that Rule 23(b)(3) was well  
 20     established in an illegal text message marketing case under the TCPA and Washington Consumer  
 21     Protection Act finding "the proposed class satisfied the "superiority" requirement of Rule  
 22     23(b)(3)" and "common issues of fact and law...predominate in this action" when—like here—  
 23     plaintiffs challenged defendants conduct of sending over 58,000 text messages to consumers'  
 24     cellular phones advertising a sale without their consent. *McClintic*, 2012 WL 112211, at \*3; see  
 25     also *Grannan v. Alliant Law Group, P.C.*, No. C10-02803 HRL, 2012 WL 216522, at \* 5 (N.D.  
 26     Cal. Jan. 24, 2012) (finding predominance and superiority under a Rule 23(b)(3) TCPA  
 27     settlement when defendants autodialed plaintiffs' cellular phones without their express consent).

1       The court in *Lo* similarly found manageability under 23(b)(3) where the focus of the  
 2 inquiry was on a common alleged violation of the TCPA; “[H]ere, a common issue predominates  
 3 over any individual issue—namely, whether the transmission and content of confirmatory text  
 4 messages allegedly sent by Defendant to all class members violates the TCPA”. *Lo*, 2011 WL  
 5 6300050, at \*2.

6       A more colorful analysis comes from the Northern District of Illinois certifying a TCPA  
 7 class action due to unsolicited fax transmissions under Rule 23(b)(3). In rejecting defendants’  
 8 argument that the case would be plagued with evidence of individual questions of consent (that  
 9 only the defendant possessed and had not produced), the court responded “[Defendants’]  
 10 contention that questions affecting only individual members would predominate over class issues  
 11 is no better than pure fiction—and a pretty poor quality of fiction at that.” *Targin Sign Sys., Inc. v.*  
 12 *Preferred Chiropractic Ctr., Ltd.*, 679 F. Supp. 2d 894, 898-99 (N.D. Ill. 2010).

13       In this case not only do common issues predominate but they make up virtually every  
 14 dispositive issue that will be before the Court.

15       **Superiority.** The next inquiry is whether the class action mechanism itself is the superior  
 16 mechanism for resolving this claim. Again, this Court’s holding is directly on point finding that  
 17 superiority is met in a TCPA and CEMA claim based on unsolicited marketing:

18       The purpose of this rule is to identify those actions in which certification of a class  
 19 would achieve economies of time, effort and expense, and promote uniformity of  
 20 decision as to persons similarly situated, without sacrificing procedural fairness or  
 21 bringing about other undesirable results.

22       ....  
 23       In this case [under the TCPA and CEMA], individual damages are small, and  
 24 class members would be unlikely to litigate claims on their own. In fact, no other  
 25 claims have been filed based on [Defendants] broadcast facsimile. Based on the  
 26 recency of the statute, potential class members may be unaware of their legal  
 27 rights. Defendant argues that potential class members could sue individually  
 because the CPA provides for recovery of attorney's fees. While attorney's fees  
 are available for Washington plaintiffs, they are not available under the TCPA.

28       The parties have not identified any difficulties likely to be encountered in the  
 29 management of this class action. This Court is an appropriate forum for this action  
 30 because plaintiff seeks to represent

31       *Kavu*, 246 F.R.D. at 650; *see also Agne*, 286 F.R.D. at 571-72 (finding superiority do to the large  
 32 size of the class and comparative small value of claims under the TCPA and WCPA); *Arthur*,

1 2012 WL 90101, at \*\*8-9 (finding superiority under a pled TCPA claim, because such claims by  
 2 their nature have “individual damages [which] are small and class members are unlikely to  
 3 litigate claims on their own.”).

4 Here, as in *Agne*, *Kavu*, *Arthur*, and *McClintic*, Plaintiff seeks to certify a case under the  
 5 TCPA with a CEMA subclass. The identical statutory damages are involved (\$500 or \$1,500  
 6 depending on whether the jury finds the conduct willful or knowing), and therefore, “individual  
 7 damages are small, and class members would be unlikely to litigate claims on their own.”  
 8 Moreover, “no other claims have been filed based on Defendants broadcast [text messages].”  
 9 When considering whether a class action is superior to individual actions, “economy and  
 10 efficiency are considered the most important elements of the inquiry.” *In re Washington Mut.*  
 11 *Mortgage-Backed Sec. Litig.*, 276 F.R.D. 658, 668 (W.D. Wash. 2011). Where the Court is  
 12 faced with the adjudication of many thousands of claims based on an admitted “practice and  
 13 procedure” of wide-spread conduct, “[i]t is beyond dispute that having all claims of the class  
 14 litigated at once will serve judicial economy and efficiency.” *Id.*

15 Finally, this Court is more than capable of managing the size and scope of this class.  
 16 While this litigation would involve thousands of class members, this class action is readily  
 17 manageable, particularly when compared to Rule 23 classes in other larger and more complicated  
 18 cases that have been managed successfully through settlement or trial. *See Duhaime v. John*  
 19 *Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54 (D. Mass. 1997) (“class consists of persons or entities  
 20 who have or had an ownership interest in one or more of approximately 3.8 million [insurance]  
 21 policies”) (nationwide class of approximately three million); *Sollenbarger v. Mountain States*  
 22 *Tel. and Tel. Co.*, 121 F.R.D. 417 (D.N.M. 1988) (antitrust class of thousands consisting of all  
 23 telephone customers in several states approved); *In re Cement and Concrete Antitrust Litig.*, 27  
 24 Fed.R. Serv.2d 1334 (D. Ariz. 1979) (antitrust class of approximately 500,000). The “Court is  
 25 well versed in the subject matter of this litigation and is no stranger to handling complex class  
 26 action litigation.” *In re Washington Mut. Mortgage-Backed Sec. Litig.*, 276 F.R.D. at 668.

27 Defendants’ uniform policy and practice of sending DN-marketing messages without

1 prior express consent not only creates legal and factual issues that predominate over the entire  
 2 class; these policies and practices constitute every dispositive issue before the Court. Requiring  
 3 Orange Cab's customers to individually litigate their claims is not superior to a single resolution  
 4 of these issues. The class is readily available, clearly defined, and identifiable. Therefore, as in  
 5 *Agne, Kavu, Arthur, McClintic, and Lo*, the Court should grant certification under Rule 23(b)(3).

6 **E. In the Alternative, a Class Certification Is Maintainable Under Rule 23(b)(2)  
 Because Plaintiff Seeks Injunctive Relief to Stop all Future Violations of the Law**

7 Under Fed. R. Civ. P. 23(b)(2), certification is appropriate when the court finds “[t]he  
 8 party opposing the class has acted or refused to act on grounds generally applicable to the class,  
 9 thereby making appropriate final injunctive relief or corresponding declaratory relief with  
 10 respect to the class as a whole.” *Kavu*, 246 F.R.D. at 649. Mr. Gragg alternatively seeks  
 11 certification under Rule 23(b)(2), as Mr. Gragg’s request for equitably relief is an equal, if not  
 12 predominate, motivation for his request of enforcement under the TCPA. “It is also well settled that  
 13 a class can be certified under 23(b)(2) even though monetary damages are sought in addition to  
 14 injunctive relief.” *Mortimore v. F.D.I.C.*, 197 F.R.D. 432, 438 (W.D. Wash. 2000). Moreover, the  
 15 Ninth Circuit has repeatedly affirmed that as long as damages are not the predominate purpose of  
 16 the litigation, certification under Rule 23(b)(2) is appropriate. *Wang v. Chinese Daily News, Inc.*,  
 17 623 F.3d 743, 754 (9th Cir. 2010) *cert. granted, judgment vacated*, 132 S. Ct. 74 (2011). This  
 18 Court, in analyzing Rule 23(b)(2) in the context of the TCPA, found certification appropriate:

19 It is more unlikely that Kavu would undertake this action, particularly as a class  
 20 representative, for a recovery that is unlikely to exceed \$500. Furthermore, Kavu's  
 21 representative states that Kavu “receives large numbers of unwanted facsimile  
 22 advertisements every year” and its “primary interest in bringing this action is to stop  
 companies like Defendant from continuing the practice of sending unsolicited facsimile  
 23 advertisements.”

24 In addition, the damages sought are incidental to the primary claim for injunctive relief  
 25 because damages are statutory and a fixed amount. Accordingly, damages may be awarded  
 26 based on objective standards rather than based on complex, individual determinations. ... In  
 this case, damages will be (1) nothing, if defendant prevails on its argument that its  
 violations were “immaterial,” (2) \$500 if it does not prevail on that claim, or (3) \$1,500 if  
 the Court finds that its conduct was willful. Because defendant engaged in the same conduct  
 regarding all of the class members, the damages issues and calculations will be the same for  
 all. Moreover, if plaintiff proves its allegations, injunctive relief would benefit all class  
 members.

27 For all of these reasons, the Court finds that certification under Rule 23(b)(2) is appropriate

1 because Omnipak has acted on grounds generally applicable to the class, and final injunctive  
 or declaratory relief is appropriate for the class.

2 *Kavu*, 246 F.R.D. at 649 (*internal citations omitted*). As outlined above, Mr. Gragg is seeking  
 3 damages of a fixed amount under the TCPA based on clear allegations and supporting evidence that  
 4 “[RideCharge and Orange Cab] has acted on grounds generally applicable to the class, and final  
 5 injunctive or declarative relief is appropriate for the class.” Certification under Rule 23(b)(2) is  
 6 appropriate.

7 Finally, Plaintiff acknowledges that careful consideration must be given to the recent United  
 8 States Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557, 180 L.  
 9 Ed. 2d 374 (2011). There, the Court concluded that Rule 23(b)(2) certification is inappropriate if  
 10 damages are individualized to each class member, such as a claim for back pay, different wage loss,  
 11 or emotional damages. The Court explained that the nature of individual damages triggers due  
 12 process considerations which are only addressed by Rule 23(b)(3) certification. *Id.* Here, however,  
 13 as noted in *Kavu*, Mr. Gragg is not seeking individualized damages, but statutory damages that  
 14 are universal and fixed across the entire class. Thus, as originally held by this Court,  
 15 certification is appropriate under Rule 23(b)(2).

## 16 VI. CONCLUSION

17 Defendants engaged in a uniform and illegal marketing campaign that violated the rights  
 18 of thousands of consumers in Washington State and across the country. Defendants’ violations  
 19 of the TCPA and CEMA were caused from the same marketing campaign carried out by  
 20 RideCharge and premised upon a legal theory that ordering a taxi was sufficient to establish  
 21 consent for commercial solicitation. As recognized in *Kavu*, *Agne*, *Arthur*, and *McClintic*, such  
 22 TCPA and CEMA claims are predominately common issues of fact and law, which make the  
 23 class action mechanism superior to flooding this Court with tens of thousands of individual  
 24 adjudications. Judicial efficiency, justice, and the policies of Rule 23 support certification of this  
 25 matter.

1  
2 RESPECTFULLY SUBMITTED: June 14, 2013  
3

4                   */s/ Donald W. Heyrich, WSBA #23091*  
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## **DECLARATION OF SERVICE**

I, the undersigned, certify that, on this date, a true copy of the foregoing document will be or has been served on the persons listed below in the manner shown:

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